2012 WL 6838721 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

CAVALIER HOMES BUILDERS, INC, Appellant,
v.
Paul BAUGHMAN and Tiffany Baughman, Appellees.

No. 2011-CA-01452.
February 22, 2012.

On Appeal from the Circuit Court of Hancock County, Mississippi Civil Action No.: 08-0420
(Oral Argument Requested)

Brief of Appellees

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***2 STATEMENT OF THE CASE**

A. Nature of the Case

The present appeal involves the sale of a defective mobile home to the Plaintiffs. Plaintiffs/Appellees, Paul and Tiffany Baughman (the “Baughmans”), purchased a double wide mobile home manufactured by Cavalier Home Builders (“Cavalier”), the Appellant in the case at bar, from Cavalier's local dealer, Albright Manufactured Homes (“Albright”). The Baughmans paid a deposit in the amount of $40,000.00 and intended to finance the remaining of the balance through a FHA loan.

Unfortunately, the mobile home could not be set up properly due to its numerous deficiencies, and after several inspections, the FHA refused to approve the loan. The Baughmans had no choice but rescind the sale of the house and asked the manufacturer and the dealer for a return of the deposit in the amount of $40,000, or the delivery of a new mobile home. Eventually the mobile home was picked up from the Appellees' lot, but the deposit was never returned, neither was a new house ever delivered. Although the manufacturer was paid in full for the sale of the mobile home the date the house was delivered to the dealer's lot, today, six (6) years later, the Baughmans are yet to receive any compensation for the damages sustained.

In 2008, the Baughmans filed a Complaint against Cavalier, the manufacturer, and Albright, the dealer. The causes of action included breach of express warranty, breach of implied warranty of habitability, deceptive and/or misleading warranty, bad faith, negligent and/or wanton construction, inspection, remediation and repair, breach of contract, misrepresentation and suppression of material facts, deceit, negligent failure to warn, conversion, and warranty claims under the UCC. The trial of this matter was conducted on June 6 and 7, 2011, in the Hancock County Circuit Court. At the end of the trial, the jury returned a verdict in favor of the Plaintiffs in the ***3** amount of $180,000.00. The jury assessed damages in the amount of $40,000.00 to the dealer and in the amount of $140,000.00 to the manufacturer. Cavalier filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative for a New Trial or, in the Alternative for Remittitur. The Motion was denied and the present appeal was filed.

B. Statement of the Facts

On or about February 7, 2006, Plaintiffs purchased a double wide mobile home manufactured by Cavalier from Cavalier's dealer, Albright. The purchase price of the house was $87,890.00. (See “Purchase Agreement,” (Clerk' s papers (“CP “) at pp 530-531). The Baughmas decided to pick some of the features of the house such as colors, appliances, and some other finishes. Instead of purchasing the Cavalier Home that was displayed at Albright's lot, Albright ordered a custom mobile home from Cavalier. (Trial “TR“ at p.116, L.27 to p. 117, L.6). The Baughmans previous home was destroyed during Hurricane Katrina, and they collected insurance proceeds in the amount of $71,000.00. (Tr. p. 111, L27 to p.112 L9; p 112, L26-27). After paying off the remainder of the mortgage on their pre-Katrina home in the amount of $30,000.00, they decided to put aside the rest of the money, approximately $40,000.00, into a savings account to use as a down payment for the subject Cavalier home. (Tr. p. 113, L.17-21).

The same day the Baughmans signed the purchase agreement they paid a down payment to Cavalier's dealer in the amount of $40,000.00. (Cp. pp. 532-533). The home was ordered the next day, on February 8, 2006. (Tr. p. 120, L.4-7). Shortly thereafter,

the Baughmans made some improvements to their lot in preparation for the delivery and set up of the mobile home. (Tr. p.120, L. 11-17). On or about March 20, ***4** 2006, the first half of the mobile home arrived to Albright's lot. Mrs. Baughman who was then excited and looking forward to the arrival of the house, drove to Cavalier's dealer's lot in Gulfport at the same exact time that the first half of the house was being delivered. (Tr. p. 121, L. 2-6). She also observed Randy Reed of Albright briefly peeking at the windows of the house and cutting a little hole in the plastic covering on the first half of the mobile home making sure the house was delivered in good condition. (Tr. p. 121, L.15-18). The second half of the house did not come in that day. (Tr. p. 121, L.20-23). On March 21, 2006, the first half of the house was delivered to the Plaintiffs' lot. The second half was not delivered until March 22, 2006. (Tr. p. 121, L. 27-29; p. 123, L. 5-8). Shortly after the second half of the house arrived at the Baughmans' lot, they noticed that the back corner had been damaged. The Baughmans did not know what had happened and no one was ever able to explain to them why or when it was damaged. (Tr. p. 123, L. 18-23).

After the power and the water was hooked up, the Baughmans started noticing problems with the house. Some of the bedrooms did not have power in the front of the house, there were water leaks in the ceiling by the fireplace, as well as a soft spot in the kitchen floor. (Tr. p. 124, L. 19-23; p. 125, L. 23-24; p. 123, L.13-17). Mrs. Baughman then called Cavalier's dealer to make them aware of the problems and Cavalier sent Charlie, a cosmetic repair person, to fix the problems in the house. Charlie told Mrs. Baughman that the electricity problem could not be fixed because there was a wire that had not been installed at the factory when the house was built. (Tr. p. 124, L. 26 to p. 125, L. 12). This immediately caused concern to the Baughmans for a potential fire hazard. (Tr. p.125, L. 13-17). As the days were passing, the Baughmans were discovering more problems with the house. The floors and the ceilings of the house could never be matched and leveled. When the floor was leveled, ***5** the ceiling was not, and vice versa. There was always a space either on the floor or on the ceiling of anywhere between half an inch to an inch. This problem was never fixed. (Tr. p. 128, L. 2-21). After learning of the water leaks in the house, Mr. Baughman bought some tar and went up to the roof and discovered that some nails were exposed. He tried to cover them with tar but this did not stop the leaks. (Tr. p. 188, L. 23 to p.189 L. 3). The plumbing in the master bathroom was also damaged and was later fixed by Cavalier. (Tr. p. 129, L. 26 to p. 130, L. 13). Perhaps one of the biggest problems that the Baughmans faced with this mobile home was the failure of the AC unit to cool in the hot and humid weather of the Mississippi Gulf Coast. Although it was Cavalier's dealer's responsibility to purchase and install the AC unit, it is the manufacturer's responsibility to specify what kind of unit the mobile home was required to have. Inside of the mobile home the manufacturer places what is called a “moisture control notice” which indicates how many tons the AC unit to be installed by the dealer must have. In the present case, Cavalier instructed Albright to install an AC unit with no more than 4 tons. (Cp. p. 637). When Cavalier's inspector, Bobbie Parks, came out to inspect the AC unit, he was able to determine that the unit indeed required 5 tons. (Cp. p. 434; Tr. p. 135, L. 20-23). Cavalier's AC expert also went up to the attic in an attempt to fix the duct work which Mrs. Baughman described at trial as “something a kid would take and just twist and shove together.” (Tr. p. 133, L. 8-12). Bobby Parks also used a thermal camera and showed Mrs. Baughman several places that had water leaks. (Tr. p. 133, L. 14 to p. 134, L. 3)Several other people came to work on the AC and duct system, including Charlie from Cavalier and Ted from Albright. (Tr. p. 139, L. 6-13). Neither Cavalier nor Cavalier's dealer were able to repair the AC even after the outside unit was changed to a 5 ton, and despite the Baughmans constant calls and requests to both Cavalier and Albright. (Tr. p. 139, L. ***6** 14 to p. 140, L. 2). The Baughmans' electricity bill was well over $400 a month whereas in their prior home, also a double wide, the electricity bill was $120.00 maximum. (Tr. p. 138, L. 13-19).

By the end of the summer the Baughmans were very frustrated with the situation as both the dealer and the manufacturer were pointing fingers at each other and did not seem to care to repair a house that was delivered in March and yet uninhabitable. (Tr. p. 140, L. 23 to p. 141, L. 3). It was then in July, 2007, when the Baughmans wrote a four page letter to Chris Newell, service manager for Cavalier, explaining in detail all the problems with the house and requesting that Cavalier repair them. (Tr. p. 141, L. 4 to p. 142, L. 14; Cp. pp. 435-438). The Baughmans sent two more letters to Cavalier and Albright asking to either return the $40,000.00 deposit, or replace the house, but they never received a response. (Cp. p. 446; Tr. p. 142, L. 19 to p. 144, L.24). It was September, 2006, when the Baughmans contacted the Fire Marshal's office to file a formal complaint since neither the dealer nor the manufacturer were cooperating. (Cp. p. 439). After the inspection was conducted and the Fire Marshall instructed the dealer to fix some of the problems in the house, the Baughmans wrote yet another letter to the Fire Marshal, Mr. Jones, explaining in detail what they were dealing with. (Cp. pp. 441-444; Tr. p. 147, L. 15 to p. 149, L. 2).

It was now February, 2007, and the Baughmans have not received redress from Cavalier or Cavalier's dealer, despite their multiple requests. The mold was now apparent inside of the house, and Mrs. Baughman placed another call to the dealer to inform them of the problem. Charlie from Cavalier came out and painted over the mold instead of repairing the leak (Tr. p. 149, L. 3-12). A second inspection of the mobile home was conducted by the Fire Marshal in the spring of 2007, and black spots were found in the ceiling of the kitchen. As a result of the inspection, the Fire Marshal sent ***7** a letter to Chirs Newel of Cavalier requesting to fix the leak. (Tr. p. 150, 21 to p. 151, L. 10). In the spring of 2007, the Federal Housing Administration also inspected the house and as a result of the inspection, the Baughmans could not close on the loan. (Tr. p. 151, L. 18 to p. 152, L. 1).

The mobile home was finally picked up from the Baughman's lot in May, 2007, by Textron, the dealer's finance company. (Tr. p. 150, L. 6-15). Since the time the mobile home arrived to the Baughman's lot in March, 2006, to the time it was picked up in May, 2007, the Baughmans lived in their personal camper, in a FEMA trailer, and MEMA cottage with their two teenage children, before they decided to build the house they currently live in, in September, 2008. (Tr. p. 114, L. 2-3, L. 12-14, L. 17-25; p.158, L.15-19; p.114, 26-27). As the Appellant points out in its brief, the Baughmans were never able to move into the 2000 square foot Cavalier home sitting next to their FEMA trailer. Rather they were forced to live in the FEMA trailer and MEMA cottage for three (3) years patiently awaiting the return of their money, or a new house that never came. Meanwhile Cavalier had received payment in full for this defective mobile home as early as March, 2006, from Textron, the dealer's finance company, in the amount of $64,642.28. (Cp. p.447). Textron also requested Cavalier to repurchase the house from them pursuant to Cavalier's repurchase agreement with its dealer, but Cavalier refused to do so. (Cp. pp. 447-448).

The Baughmans submitted the case to the Jury in three different theories of liability: apparent agency (Cp. pp. 523-524), breach of contract (Cp. p. 522), and negligence (Cp. p. 650B). At the end of the trial, the jury returned a verdict in favor of the Plaintiffs and against Cavalier in the amount of $140,000.00 (Cp. pp. 651-652).

***8 STATEMENT OF THE ARGUMENT**

At trial the Plaintiffs/Appellees testified and introduced sufficient evidence to prove by a preponderance of the evidence that Cavalier was an agent of Albright, that Cavalier breached the contract it had with the Baughmans through the warranty offered with the mobile home in question, and that Cavalier was negligent in manufacturing the house, delivering the house, and repairing the house after it was set up by its dealer, Albright.

Cavalier argued that all the problems outlined in the facts of this case were the dealer's fault and that Cavalier did not do anything wrong. (Tr. p. 328, L. 17-23). Jerry Dudley from Cavalier went as far as to testify that they made no mistakes with this house (Tr. p. 268, L. 23-24), that Cavalier bears no responsibility with the situation (Tr. p. 271, L. 15-18), and that he stood by all of Cavalier's decisions in this case (Tr. p. 273, L. 24 to p. 274, L. 7). Moreover, he testified that they could have put more money into repairing the Baughman's house, but they felt that was the dealer's responsibility.(Tr. p. 329, L. 26 to p. 340, L. 7). Meanwhile, the same company that refused to spend some few thousand dollars more to make the house habitable, and the Plaintiffs whole, had already been paid in full. Cavalier was not out one penny (Tr. p. 253, L. 13-22). The dealer, on the other hand, only gets paid upon closing. (Tr. p. 266, L. 23-29). The loan never closed.

Cavalier attempted to blame the dealer for all the defects in the mobile home. The same dealer they trusted and did business with for four years, and the same dealer that at some point in time was an exclusive dealer of Cavalier. (Tr. 270, L. 15-18). But, at the same time, Mr. Dudley testified in favor of the dealer when it came ***9** time to determine when the mobile home was damaged. Mr. Dudley stated that he knew the house was not damaged during transportation from Cavalier to Albright, a journey of 360 miles, but from Albright's lot in Gulfport to the Plaintiffs' lot in Bay St. Louis, only 36 miles. (Tr. p. 324, L. 15-16).To make this statement Mr. Dudley relied solely on a document showing how Randy Reed of Albright signed and acknowledged that, upon delivery to his lot, both halves of the mobile home were inspected and no damage was found. (Tr. p.251, L. 5-17; Tr. p. 269, L. 24 to p. 270, L. 8; Tr. p. 324, L. 7-12). Mr. Dudley, however, could not explain to the jury why both halves of the mobile home left the factory on the same day, but were delivered on two different dates (Tr. p. 326, L. 22 to p. 327, L. 26), although he testified that usually they leave and arrive at the same time.(Tr. p. 252, L. 23 to p. 253, L. 2). In

other words, Mr. Dudley's testimony was contradictory. On the one hand he was defending Randy Reed's ability to properly comply with some of his duties, while discrediting him for failing to fix the house, accusing him of running with the Plaintiffs' down payment, and testifying that Cavalier's relationship with Albright would have ended then even if Albright had not gone out of business. (Tr. p. 269, L. 11-23; Tr. p. 329, L. 14-19). In short, at trial Cavalier stood by Albright's actions when it was beneficial to them, but blamed Albright to shield Cavalier's liability.

The first thing this Honorable Court has to decide is whether apparent authority was created in this case pursuant to Cavalier's actions and inactions. If apparent authority is deemed to exist, then Cavalier is liable for Albright's actions as a matter of law. However, if the Court finds that the facts of this case are not sufficient to create an agency relationship, then the Court must decide whether Cavalier breached its contract to the Baughmans by failing to uphold the warranty of the house in question, and whether Cavalier was negligent in failing to properly build, transport, ***10** deliver, and repair the subject home. The claims for breach of contract/warranty and negligence arise solely from Cavalier's actions and inactions and are in no way connected to agency. So even if the evidence introduced at trial is not sufficient to rise to the level of agency, the breach of contract and negligence claims survived.

Cavalier denies the existence of an agency relationship based on a retailer agreement between Cavalier and Albright wherein Cavalier undeniably states that Albright is not its agent. The trial testimony and the Court record, however, clearly indicate that this document was not made available to the Baughmans at the time they purchased the mobile home. Indeed, the Baughmans were only allowed to see this document once the litigation had started, and subject to a confidentiality Order from the trial Court. Agency in the present case is neither negated nor regulated by this agreement. Apparent agency is this case was created solely by Cavalier's actions and inactions following the sale and delivery of the mobile home.

Cavalier also denies the existence of a contract between the parties because the purchase agreement was strictly entered between Albright and the Baughmans. Cavalier argues that it lacked privity. Mr. Dudley, however, testified that the mobile home warranty, delivered directly from the manufacturer to the buyer, started to run upon delivery of the subject home, and for a period of one year. Because Cavalier failed to comply with its obligation under the home warranty, Cavalier is in breach of contract.

Furthermore, Cavalier denies that they were negligent in any way and attempted to blame all the defects of the house in the way the dealer set it up. Plaintiffs' expert, however, testified that the two halves could not have been matched by the dealer or in technical terms, the house was “out of camber”. Several pictures were introduced at trial showing the condition of the roof, and the condition of the ***11** walls and the electrical wires once the house was taken apart at the time it was picked up from the Plaintiffs lot. The pictures speak for themselves. Clearly, Cavalier was negligent not only at a factory level, but also when it came time to transport, deliver, and repair their very own product, the mobile home.

Finally, Cavalier argues that even if they are liable in any way to the Plaintiffs, damages should only be awarded in the amount of $4,800.00 for the Baughman's out of pocket expenses. Plaintiffs, on the other hand, contend the award of damages was proper. The remedy in a breach of contract claim is to restore the injured party, in this case the Baughmans, in the same position they were prior to Cavalier's breach of contract. Mrs. Baughman testified that she wanted another house even after all the problems they went through. Therefore, Mrs. Baughman is entitled to the purchase price of the house in the amount of $87,890.00 plus interest, out of pocket expenses in the amount of $4,800.00, emotional distress damages, and attorney's fees and expenses. The judgment against Cavalier in the amount of $140,000.00 is not excessive, and Cavalier's Motion for remittitur was properly denied.

For all of the above mentioned reasons, the trial Court did not err in denying Appellant's Motion for a Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, or in the Alternative for Remittitur.

***12 ARGUMENT**

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR A NEW TRIAL

A. Applicable standards of review for Motions for Judgments Notwithstanding the Verdict and Motions for New Trial.

In *Jesco, Inc. v. Whitehead*, 451 So.2d 703 (Miss., 1984), the Court held:
The *motion for JNOV* tests the legal sufficiency of the evidence supporting the verdict. It asks the Court to hold, as a matter of law, that the verdict may not stand. Where a motion for JNOV has been made, the trial court must consider all of the evidence--not just evidence which supports the non-movant's case--in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. *See, e.g., General Tire and Rubber Co. v. Darnell,* 221 So.2d 104, 105 (Miss. 1969); *Paymaster Oil Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975); *City of Jackson v. Locklar,* 431 So.2d 475, 478 (Miss.1983).

The *motion for a new trial* is an altogether different animal. While a motion for judgment notwithstanding the verdict presents to the Court a pure question of law, the motion for a new trial is addressed to the trial court's sound discretion. That as a matter of law the motion for judgment notwithstanding the verdict must be overruled and denied in no way affects and little informs the trial judge regarding his disposition of the motion for a new trial. Indeed, cases are hardly unfamiliar wherein the Court holds that the evidence is sufficient so that one party or the other was not entitled to judgment notwithstanding the verdict, but, nevertheless, that a new trial in the interest of justice should be ordered. *See, e.g., Larkin v. Perry,* 427 So.2d 138 (Miss.1983). A greater quantum of evidence favoring the party against whom the motion is made is necessary for that party to withstand a motion for a new trial as distinguished from a motion for JNOV Under our established case law, the trial judge should set aside a jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence. *Mobile and Ohio Railroad Co. v. Bennett,* 127 Miss. 413, 415, 90 So. 113 (1921); ***13** *Columbus and Greenville Railway Co. v. Buford,* 150 Miss. 832, 840, 116 So. 817 (1928); Odier v. Sumrall, 353 So.2d 1370, 1374 (Miss.1978); Cf. Rule 5.16(2), Miss. Uniform Cr.R. of Cir.Ct. Practice. This is so even though he may have denied the motion for JNOV. There is no inconsistency between a holding by the trial judge, first, that there is evidence in support of the verdict sufficient to require denial of the motion for JNOV, while at the same time holding that the verdict is against the substantial weight of the evidence so that justice requires a new trial.

Jesco, Inc. v. Whitehead, 451 So.2d 703, 713-14 (Miss., 1984)(Robertson, J., Concurring)

This Court reviews a Circuit Court's decision to deny a JNOV motion de novo. *Univ. of S. Miss. V. Williams*, 891 So.2d 160, 167-38 (Miss. 2004)(citing Northern *Elec. Co. v. Phillips,* 660 So.2d 1278, 1281 (Miss. 1995)).On appeal, this Court may reverse the granting of a new trial only when the trial court has **abuses** its discretion. Green & Grant, 641 So.2d 1203, 1207 (Miss. 1994).

Plaintiffs will show unto this Court that the trial Court did not err in denying Cavalier's Motion for JNOV and New Trial, given the facts of this case, and the evidence presented and heard at the trial of this matter.

B. The case was submitted to the Jury on three theories of liability: Apparent Agency, Breach of Contract, and Negligence.

In its brief, Appellant states that the Baughman's case was submitted to the jury only on two theories of liability: breach of contract and products liability. Cavalier conveniently forgets that there were also jury instructions on apparent agency and negligence. (Cp. pp. 523-524; Cp. p. 650B). Cavalier is wrong to argue that the Baughmans did not submit the case on the theory of "negligent repair" because there was a court instruction on negligence. Specifically the negligence jury instruction stated as follows:

> ***14** Negligence may be defined as the failure to use reasonable care. Reasonable care is the degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or the failure to do something that a reasonably careful person would do under like circumstances. (Cp. p. 650B).

At trial, the jury heard nothing but evidence concerning both negligent manufacturing and negligent repair. Clearly, the case was submitted to the Jury on the theory of negligence despite Appellant's attempt to avoid negligence. Similarly, there was a jury instruction on apparent authority. (Cp. p. 523). Therefore, the case was submitted on three (3) different theories of liability: apparent agency, negligence, and breach of contract.

Accordingly, the Baughmans believe that the jury returned a verdict against Cavalier because they found that Albright was an agent of Cavalier, and as such the principal, Cavalier, is responsible for any resulting injury to the Baughmans. But in the event this Court finds that Cavalier's acts and omissions are insufficient to rise to the level of apparent agency, then the Baughmans submit that the jury returned a verdict against Cavalier for its breach of contract through warranty and its negligence. These two theories of liability arise from Cavalier's own actions and inactions, not from agency.

C. Preliminary Issues concerning Agency

The appellant states in its brief that in order for an agency relationship to exist, it has to exist at the time the Baughmans signed the agreement with the dealer for the purchase of the mobile home. Cavalier fails to cite case law to support its statement. A plain reading of the definition of apparent agency, as given to the jury, negates ***15** Cavalier's argument. Apparent authority does not have to exist at the time the Baughmans entered the contract, but rather can be created at any time thereafter, due to the principal's actions or inactions. As this brief will address later, the Baughmans contend that apparent authority existed not only at the time they signed the agreement with the dealer through the banner displayed by the dealer, but also from the actions and inactions of Cavalier from the time the home was delivered to the Baughman's lot in March, 2006, to time it was picked up in May, 2007.

C.1. Agency and Negligence

Appellant is also trying to convince this Court that if agency does not exist, then Cavalier is not liable to the Baughmans in either contract or negligence. Specifically Appellant states in its brief:

> the "agency" issue may have been intended to impose liability on Cavalier for Albright's negligent repair of the home. However, because the Baughmans did not present a "negligent repair" theory of liability, the jury could not have found Cavalier liable under the agency doctrine for any negligent repairs by Albright.

There are several problems with this statement. First of all it assumes that only Albright was negligent in repairing the house and that Cavalier had no duty to repair the house. Although Plaintiffs agree that Albright bore a duty to repair, and breached its duty to the Baughmans, the court testimony clearly indicates that Cavalier also bore a duty and was also negligent when it came time to repair the mistakes that came straight from the manufacturer plant with no dealer involvement. Mistakes such as the roof, the electricity, the AC, and the mold in the house. Cavalier sent Charlie Shoemaker, a cosmetic repair person, to fix the roof, the AC, the electricity, and the water leaks. Therefore, Cavalier was negligent on its own and agency is not necessary ***16** to

prove Cavalier's negligence. Agency is only necessary to impute Cavalier with those acts of negligence committed by its dealer, Albright. Second of all, as noted above the Baughmans did present the jury with a jury instruction on negligence and said jury instruction given by the Court should cover both Cavalier and Albrigh's negligence with and without agency. Finally, Cavalier is attempting to limit the scope of liability through agency by saying that the jury could not have found Cavalier liable under the agency doctrine for Albright's negligent repairs. Again, if the jury found that Albright was the apparent agent of Cavalier, then Cavalier is responsible for all of Albrights wrongdoing to the Baughmans whether in contract, negligence, or products liability theories. [1] The two are not mutually exclusive, Cavalier can be liable to the Baughmans for Albright's negligent acts through agency, and at the same time be liable to the Baughmans for its own negligence.

C.2. Agency and Contract

In an attempt to confuse this Court, Appellant also states in its brief that the jury could not have found Cavalier liable for breach of contract through agency because Cavalier was the disclosed principal of Albright. Cavalier cites case law holding that when a principal is disclosed, the supposed agent cannot be liable for the breach of contract, absent fraud. *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989). This statement is wrong simply because Cavalier assumes that Mrs. Baughman knew at all times relevant hereto that an agency relationship existed ***17** between Cavalier and Albright, and therefore, Albright was the agent of a disclosed principal. However, Mrs. Baughman testified that she did not know the difference between an agent and an authorized dealer, the difference between an agent and an exclusive authorized dealer, or the difference between an authorized dealer and an exclusive authorized dealer. (Tr. p. 180, L. 11-29). Mrs. Baughman never had actual knowledge of the agency relationship. She testified that in her mind they were working together. But to hold the Baughmans to the standards and theories of disclosed and undisclosed principals is unfair and contradictory considering Cavalier constantly negated the existence of an agency relationship between the parties at trial. (Tr. p. 256, L. 25-28). Moreover, the case cited by Cavalier, *Gray*, deals with the theory of piercing the corporate veil to hold individual corporate agents liable for the corporation's breach of contract when the contract was signed by the corporation not the individuals. The Court held that Gray, a businessman himself, knew at all times that the contract was entered by the corporation and not the individual agents. The Court held that Gray did not put forth sufficient evidence to pierce the corporate veil. Clearly, the Gray case has little connection to the facts of the Baughmans case. The Baughmans are neither business people nor attorneys with sufficient knowledge to know that Cavalier was a disclosed principal. The disclosed principal theory is not applicable to this case because it is clear that the contract was entered between the Baughmans and Albright. Cavalier can only be liable for Albright's breach of contract through apparent agency.

Furthermore, when discussing the issue of disclosed and undisclosed principals Cavalier went as far as to cite case law stating that “in assessing percentages of fault a principal and a principal's agent shall be considered as one (1) Defendant when the liability of such principal has been caused by the wrongful or negligent act or omission ***18** of the agent.” (Appellant's brief p. 15). Applying this principal to the present case, Cavalier concludes in its brief:

> “.... if Cavalier was Albright's disclosed principal for the purpose of the purchase contract, Albright was not a party to the contract at all. Thus, Albright could not have been liable for the alleged breach of contract, and Albright and Cavalier were supposed to be considered as a single defendant when assessing damages for the breach.”

This statement is shocking considering that throughout the trial Cavalier negated that they were the same Defendant. Defense counsel made sure during his opening statement and during Mrs. Baughman's cross-examination, that the jury understood that Cavalier and Albright were two different defendants, and that the contract for the purchase of the mobile home was entered between Albright and the Baughmans solely. (Tr. p. 103, L. 9 to p. 110, L.4; Tr. p. 166, L. 4 to p. 167, L. 11).

Furthermore, there was no jury instruction or mention of the terms disclosed and undisclosed principal at trial. Therefore, the jury could not have found that Cavalier was a disclosed principal of Albright for the purpose of the breach of contract claim through agency.

The only issue for this Court to decide is whether Albright was the apparent agent of Cavalier. If the answer is in the affirmative, then this Court should considered the damages to be awarded. If the answer is in the negative, then the Court should determine if Cavalier was negligent on its own and if Cavalier breached its contract with the Baughmans through the warranty offered with the mobile home.

D. The Baughmans introduced sufficient evidence at trial for the jury to find that Albright was the apparent agent of Cavalier

***19** An agency relationship exists and a principal is bound by the acts of the agent as against a third party where the agent had (1) *express authority* directly granted by the principal to bind the principal as to certain matters, or (2) *implied authority* to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority, or (3) *apparent authority*. *Patriot Leasing v. Jerry Enis Motors*, 928 So.2d 856 (Miss., 2006).(emphasis implied).

In the present case it is undisputed that Albright did not have express authority to act on behalf of Cavalier pursuant to the provisions of the retailer agreement entered between Cavalier and Albright in 2003. (Cp. pp. 484-492). Specifically, the agreement states as follows:

> The parties acknowledge that the only relationship between them is that of an independent manufacturer on the one hand and an independent dealer and guarantor on the other, and that this agreement does not create any partnership, joint venture, or agency relationship between the parties. (Cp. p. 488).

It is also undisputed that the Plaintiffs cannot be held to know the contents and meaning of the agreement because they were never told that such an agreement existed. (Tr. p. 159, L. 22 to p. 160, L.1; Tr. p. 160, L. 29 to p. 161, L. 20). In Leasing the Court held that while a third party cannot rely on the apparent authority of an agent to bind a principal where he has actual knowledge of the limits of the agents authority, without such *actual knowledge*, the third party must exercise only reasonable diligence to ascertain the agent's authority. *Patriot Leasing v. Jerry Enis Motors*, 928 So.2d 856, 864 (Miss., 2006) (citing *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 375, 246 A.2d 407, 410 (1968))(emphasis implied). Although during his testimony at trial Mr. Dudley implied that the dealer could have given the agreement to the Baughmans at the time they purchased the house (Tr. p. 256, L. 2-8), the court ***20** record speaks by itself. The document is marked "produced subject to a protective order" (Cp. pp. 457-492), and a protective order was entered by the trial Judge on June 17, 2010. (Cp. pp. 194-201). Clearly, the Baughmans did not have access to this document at the time they purchased the house, and for many years to come because this document was not produced to the Plaintiffs until 2010. Because the Baughmans did not have an opportunity to read or review the retailer agreement that denied the existence of an agency relationship between Cavalier and Albright, *reasonable diligence* on the part of the Plaintiffs is the standard to be applied in determining whether Albright was the apparent agent of Cavalier.

An apparent or ostensible agent is one whom the principal has intentionally or *by want of ordinary care* induced third parties to believe is his agent, although no authority has been conferred on him either expressly or by implication. An apparent agent is one who *reasonably appears* by third parties to be the authorized agent of the principal. *Cooley v. Brawner*, 881 So.2d 300,301 (Miss. App., 2004)(emphasis implied).

The trial court had the opportunity to hear the argument concerning agency on two different occasions in the course of the litigation of this matter. The first time was when the Plaintiffs filed their Partial Motion for Summary Judgment on the Issue of Liability. (Cp. pp. 125-134). The second time was when the Defendant moved for Directed Verdict at the trial of this matter. (Tr. p. 275, L. 17, to p. 288, L. 288).The trial Court denied both motions. (Cp. p. 355; Tr. p. 287, L. 27 to p. 288, L.1). Ultimately, the issue of agency went to the jury via Defendant's Jury Instruction D-3. (Cp. pp. 523-524).

***21** In an attempt to confuse this Court concerning the issue of agency, the Appellant's brief discusses agency from the stand point of a disclosed and undisclosed principal. However, there was no mention of this theory at trial, and the issue of agency was submitted to the jury on apparent agency only, and it was defined as follows:

> "Apparent authority" of an agent is that authority which a reasonable prudent person, familiar with the usage of the particular business, would think such an agent would have. If a principal by words or conduct permits such appearance of authority in an agent, the principal is responsible for any resulting injury to another, provided the injured person acted reasonable in reliance on such appearance of authority and did not know, or had reason to know, the true facts of the agent's authority. (Cp. p. 523)

Cavalier in its brief analyzes the facts presented by the Plaintiffs at trial to prove apparent agency: 1) the banner, and 2) Cavalier and Albright's actions when communicating with the Plaintiffs, as two complete and individual facts to prove apparent authority. Plaintiffs contend that although these two facts when analyzed separately may by themselves prove apparent agency, for the purpose of this appeal, these facts should not be separated, but rather looked at together as a combination of actions and omissions that caused Plaintiffs to reasonably believed that Albright was the apparent agent of Cavalier.

Mrs. Baughman testified that at the time she signed the contract, there was a big banner displayed at Albright's office with Cavalier's name on it. (Tr. p. 116, L. 9-11). Mrs. Baughman also testified that she did not see any other banners displayed with other dealer's names on them. She only saw the Cavalier banner. (Tr. p. 165, L. 4-19). Also, Mrs. Baughman testified that after the house was delivered and set up by the dealer, Cavalier's employees were in the house on fourteen different occasions. (Tr. ***22** p. 161, L. 21-23). She also testified that in her mind Cavalier and Albright were working together because she will call Albright and somebody from Cavalier will come out and viceversa. (Tr. p. 146, L. 28 to p. 147, L. 13). Mrs. Baughman also testified that at some point she started contacting Cavalier's employees directly on a regular basis after Randy from Albright had given her their number. (Tr. p. 131, L. 21 to p. 132, L. 6) She also testified that she wrote letters to both Albright and Cavalier concerning repairs in the house and requesting the house to be replaced or their deposit returned. (Tr. p. 141, L. 12 to p.144, L. 15).

Furthermore, the case cited by the Defendant to discredit Mrs. Baughman's testimony regarding the Cavalier banner displayed at Albright's office is distinguishable from the present case.[2] In Levine, Howard Hearon leased a gasoline filling station from Standard Oil. The Plaintiff was a customer who had stopped at the shop to have the tires of his vehicle fixed. While his car was serviced, a tire exploded causing Levine to suffer injuries. The Court dismissed Standard Oil holding that the display of a logo was insufficient to create an agency relationship between the parties. Most likely, no further communication will exist between Levine and the owner or operator of the service station. The Baughmans, however, were buying a mobile home that was manufactured by Cavalier and sold to them by Albright. Albright was going to deliver and set up the mobile home. It is expected in the mobile home industry that there is going to be further communications between Albright and the Plaintiffs, and possibly, as it happened in this case, future visits to the office where the banner was displayed. Even Mr. Dudley testified that on average customers go to the dealer's lot five (5) times before they purchased a mobile home. (Tr. p. 243, L. 22 to p. 244, L. 2).

***23** In addition, there is no indication in the *Levine* case that the service station operator, Hearon, was not to display Standard Oil's name in connection with the operation of the business. In the case at bar, the retailer agreement introduced as evidence at the trial of this matter clearly stated that Albright was not to display Cavalier's name in connection with the operation of its business. (Cp. p. 488). Apparent authority as defined above is not only conferred when the principal, in this case Cavalier, intentionally makes third parties believe that they are dealing with an agent, but also when the principal, by *want of ordinary care* induces third parties to believe that they are dealing with its agent. Section 11 of the retailer agreement prohibits Albright to use Cavalier's name for the operation of its business. Section 11 titled "relationship", is the same section that states that no agency relationship exists between the parties, and that the retailer shall not hold itself out to the public as an agent of Cavalier. (Cp. p. 488). Hence, Cavalier was concerned that if the retailer used Cavalier's name in connection with the daily operations of its business, third parties like the Baughmans may get confused. This goes on to emphasize that the use of Cavalier's name

in Albright's place of business created apparent authority. If Cavalier knows that customers returned to the dealer's lot several times before the purchase, why didn't Cavalier inspect the dealer's lot and office more frequently?.

While Defendant is correct to state that generally the principal is not bound by the acts of the agent when they are logos or trademarks displayed in the alleged agent's place of business, the Mississippi Supreme Court has also held that sometimes those logos, along with other acts of control, create an agency relationship. *See* ***Elder*** *v.Sears, Roebuck & Co.*, 516 So.2d 231 (Miss., 1987). On January 14, 1982, Minnie **Elder** entered the Sears store owned and operated by Bates to make a payment on her Sears charge account. As Mrs. **Elder** turned into the area where the floor had been ***24** mopped she slipped and fell. At trial Sears contended that the evidence indicated that Sears was not the owner, possessor, or party in control of the premises operated by Bates. Sears argued that when there is no control by the person or party who engages, then no vicarious liability for the tortious conduct of the independent contractor may be imputed to Sears as a matter of law. In analyzing the issue of agency, the Supreme Court looked not only at the Sears sign displayed in Bates' building, but also turned to the agreement entered between the parties, Sears and Bates, that regulated their relationship. The Court found that Sears retained control of Bates' business operations. One of the factors discussed was Sears' access to Bates' financial information.

Similarly, a reading of the standard retailer agreement between Cavalier and Albright indicates that Cavalier exercised control over Albright. Section 5 of the standard retailer agreement “Right of Offset, Security Interest and Power of Attorney”, states that the retailer authorizes any third party lending institution to share with Cavalier any financial or other information, whether such information is furnished by retailer or acquired by lender in the normal course of business. (Cp. p. 486). Section 8 of the retailer agreement “financial information” states that the retailer shall provide Cavalier with financial statements on an annual basis within ninety (90) days of each calendar year end during the term hereof. (Cp. p. 487). Section 13 of the agreement “insurance” states that the retailer shall at all times maintain general liability insurance coverage containing terms and provisions satisfactory to Cavalier with limits of liability of not less than $1,000.000, and shall provide Cavalier with a certificate of insurance and/or copy of the insurance policy and copies of any renewals thereof. (Cp. p. 489). In addition, Cavalier had the right at its sole discretion to reject orders from the retailer or modifications to the orders, and reserved the right to adjust the price of ***25** the homes ordered after a binding order from the retailer. (Cp. pp. 484-492). At some point Albright also signed an exclusive dealer agreement with Cavalier where Cavalier agreed to pay Albright a volume incentive. (Cp. pp. 471-478). Similarly, Bates was paid a sales commission by Sears. Under the exclusive dealer agreement Cavalier also required Albright to have a minimum of eight (8) Cavalier houses in stock and those houses needed to be at a specific location, the exclusive dealer location.

Cavalier's representative, like Sears, testified that Cavalier retained no control over Albright's operation of the business. (Tr. p. 317, L. 29 to p.319, L. 9). However, the retailer agreement between the parties states otherwise. Therefore, Plaintiffs submit that the powers retained by Cavalier in this case are similar to those retained by Sears, and therefore, Cavalier exercised control over Albright, despite Cavalier's testimony at trial.

It is well established in Mississippi than in order to prove apparent authority the Baughmans have to prove three elements: (1) acts of conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance. *Patriot Leasing v. Jerry Enis Motors*, 928 So.2d 856 (Miss., 2006)(quoting *Christian Methodist Episcopal Church v. S & S Construction Co., Inc.*, 615 So.2d 568, 573 (Miss. 1993)).

As explained above the **acts of conduct on the part of the principal** exist either by actions or omissions of the principal. In the case of the banner, apparent authority was originated through Cavalier's omissions and inactions. If Albright was in violation of the terms of the agreement, why did not Cavalier take the necessary steps to remove the banner? It is no excuse that Cavalier had no idea who made the banner, ***26** where the banner came from, or who hung the banner. Cavalier and not the Baughmans chose Albright to be its “authorized dealer”, and at some point in time, Albright was Cavalier's exclusive dealer. In addition, only Albright and Cavalier were aware of the terms of the agreement. The Baughmans saw the Cavalier banner and thought that Albright and Cavalier were working together. Defendant emphasizes the fact that the Plaintiffs were looking at other double wide homes manufactured by Deer Valley also located at Albright's lot, and Plaintiffs knew or should have known then that Albright was not an agent of Cavalier because Albright was also selling Deer Valley mobile homes. Plaintiffs contend that

the Defendant is reaching conclusions that a reasonable lay person will likely not reach. Mrs. Baughman testified that no Deer Valley banner was present at Albright's office, and therefore, she reasonably believed that Albright was working as an agent for Cavalier. (Tr. p. 165, L. 4-19).

The testimony of Mrs. Baughman is clear. Once the house was delivered and the "repair" process started, there was no separation whatsoever between Albright and Cavalier. Employees of both companies will come to the house at the same time to fix the same item. For example employees of both Cavalier and Albright were involved in fixing the roof, the AC, and the electricity. Cavalier's employees were at Mrs. Baughman's house a total of fourteen times although Cavalier claims that they did nothing wrong. (Tr. p. 161, L. 21-24). How can the Baughmans know who is who? Mr. Newell of Cavalier testified that Cavalier never sent a letter to the Baughmans telling them to stop contacting its employees or advising them that this was the dealer's responsibility and not Cavalier's, and that Cavalier was not going to fix the house. (Tr. p. 299, L. 2-15).

***27** In its brief Cavalier goes as far as to say that in order to prove apparent authority, the Plaintiffs must prove that they purchased the Cavalier mobile home solely because of the displayed banner. This statement has no legal basis and it is beyond the scope and definition of apparent authority. The Defendant cites the decision in *Patriot Leasing,* but in the *Patriot Leasing* case neither a logo nor a banner was discussed by the Court or even argued by the parties. In the Patriot case the dispute arises out of a contract between a leasing company and the owner of a dealership. The leasing company reliance in arguing apparent authority did not arise out of logos, trademarks or banners. Therefore, this Court should disregard Appellant's argument.

The Defendant has also stated in its brief that the **Plaintiffs' reliance** was not reasonable as the Baughmans were familiar with the manufactured home industry because in 1991, fifteen (15) years prior to the purchase of the Cavalier manufactured home, they had bought a Fleetwood manufactured home from AAA. (Tr. p. 111, L. 18-23). Mrs. Baughman testified, however, that they never had a problem with this house and, therefore, no further communications existed between them and the dealer and/or manufacturer. (Tr. p. 111, L. 24-26). It was a onetime transaction fifteen (15) years prior to the purchase of the Cavalier home. While it .is true that when they purchased the Fleetwood home they only dealt with the dealer, it does not mean that they knew this was the normal procedure because it was the first time they had purchased a mobile home, and the transaction took only few hours. Therefore, Plaintiffs contend that they were not familiar enough with the industry to determine that Albright was not Cavalier's agent, but rather an independent dealer. Clearly, Plaintiffs relied in Cavalier's actions and in the many conversations they had with Cavalier's employees concerning repairs in the mobile home, as well as Cavalier's ***28** constant appearances at the Baughman's house to inspect and attempt to correct mistakes.

Finally, there is no doubt that the Baughman's reliance in Cavalier's actions were to their **detriment** since the home in questions was never repaired, a new home was never delivered, and six years down the road, the Baughmans are yet to be compensated for their loss.

Consistent with the definition of apparent authority and apparent agency found in *Cooley v. Brawner,* 881 So.2d 300 (Miss. App., 2004), and Patriot *Leasing v. Jerry Enis Motors,* 928 So.2d 856 (Miss., 2006), and based on Albright and Cavalier's actions and omissions as discussed above, Albright reasonably appeared to the Baughmans to be Cavalier's apparent agent. Albright was also found to be Cavalier's apparent agent by the jury after the evidence was presented at trial and they heard the testimony of the witnesses.

E. The Baughmans introduced sufficient evidence at trial for the jury to find that Cavalier failed to comply with its obligations under the warranty agreement, therefore, breaching the contract with the homebuyers, the Baughmans.

Defendant contends that the Baughmans contracted directly with Albright, the dealer, and that no privity of contract exists between Cavalier and the Plaintiffs, and therefore, the Baughmans are barred from invoking a breach of contract claim. In considering whether a breach of contract exists, we go back to the argument of whether Albright was an agent of Cavalier. If Albright was acting on behalf of Cavalier at all times relevant hereto, then through agency, Cavalier was part of the contract.

***29** During the trial of this matter, Cavalier portrayed to this Court and the jury that the sale from Cavalier to Albright and from Albright to the Baughmans were two complete independent sales, and that once the manufactured home leaves the factory, and is satisfactorily delivered to the dealer, Cavalier's responsibility ceases. (Tr. p. 243, L. 22-26; p. 245, Tr. p. 245, L. 12-22; Tr. p. 269, L. 1 to p. 270, L. 8).

This is however, a very simplified version of the facts. In this case, like in many other cases where the sale of a mobile home is involved, the manufacturer's responsibilities do not cease, but rather start when the house is delivered to the purchaser. The Court and the jury had an opportunity to hear testimony from Cavalier's representative, Jerry Dudley, stating that once the home is delivered to the buyer, the one year product warranty starts running. (Tr. p. 241, L. 23 to p. 242, L. 15). This is very much like the purchase of a new automobile. If something goes wrong with the car while the car is under warranty, then the manufacturer is ultimately responsible. As consumers, we may contact the dealer we bought the car from, but the manufacturer is responsible for its product.

Therefore, this simplified version presented by Cavalier has very little connection with what actually happens once the house is delivered. If Cavalier had no responsibility in connection with this house once it was accepted by Albright, why were Cavalier's employees sent at least fourteen times to Plaintiffs' home? Why did the Fire Marshall contact Cavalier and instruct Cavalier to perform inspections and fix the damage?. If Cavalier truly believed that they had no obligations under the contract signed by the Baughmans and Albright, they should have never sent service managers, answered Plaintiffs phone calls, or responded to any of Albright's phone calls.

***30** While it is undisputed that Cavalier was not part of the purchase agreement, it is also undisputed that once the contract was signed, Cavalier was obligated to build Plaintiffs' home and was obligated through the warranty offered with its product, in this case the warranty of the double wide, to deliver a mobile home that was suitable for living purposes. If there is no contract, there is no warranty. But if there is a contract, there is a warranty. It is also undisputed that the warranty is offered directly from the manufacturer to the purchaser, and the dealer bears no responsibility concerning warranty repairs.

Further, the breach of contract claim found in the original complaint refers to both Defendants, Albright and Cavalier, and lays the foundation for a breach of contract through warranty.[3] (Cp. p. 19) This case has been in litigation for three (3) years now and Cavalier never raised the issue of lack of privity of contract until the trial of this matter. The evidence presented at trial clearly indicates that Cavalier failed to comply with its duties under the warranty, and therefore, Cavalier is in breach of contract through agency and warranty.

The elements of a valid contract as presented to the jury via Jury Instruction D-2, exist and have been proven to support Plaintiffs' claim for breach of contract. (Cp. p.522). Because Albright was acting on behalf of Cavalier at all times relevant hereto, and the contract was indeed signed by the Baughmans, Cavalier was obligated under the contract to deliver a mobile home suitable for living purposes. Because Cavalier failed to comply with its obligations under the contract and under the product's ***31** warranty, Plaintiffs were monetarily damaged in an amount in excess of the value of the home in question. Therefore, Cavalier is liable to the Plaintiffs for breach of contract.

F. The Baughmans introduced sufficient evidence at trial for the jury to find that Cavalier negligently manufactured, transported, delivered and repaired the subject mobile home.

At the trial of this matter, the Court instructed the jury on the issue of negligence. In doing so the Court stated that negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonable careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances. (Cp. p. 650B),

The elements of a negligence action are well-settled in Mississippi. A plaintiff in a negligence suit must prove by a preponderance of the evidence that the Defendant owed a duty to the Plaintiff, that the duty was breached by the Defendant, and that the breach caused the Plaintiff to sustain injuries/damages. Vaughn v. Ambrosino, 883 So.2d 1167 (Miss. 2004). Mrs. Baughman, and Plaintiffs' expert, Robert Coker, testified at the trial of this matter as to the numerous manufacturing defects found shortly after the house was delivered.

***32** Although Plaintiffs do not contend that all the problems with the mobile home were the responsibility of Cavalier, there were clearly many problems with the way this house was manufactured. Mrs. Baughman testified that the there were problems with the power inside of the house as soon as it was set up. (Tr. p. 124, L. 13-17). Specifically, she stated that the power in the front two bedrooms, the hallway, and one of the walls in the living room was not working, and also the lights in the hallway were not working. (Tr. p. 124, L. 18-25). Cavalier sent Charlie Shoemaker to fix this problem and after he was finished some of these lights were still not working properly in the hallway. Mrs. Baughman testified that Mr. Shoemaker told her that "there was a wire that had not been installed at the factory level when the house was built. (Tr. p. 124, 26 to p. 125, L. 1). The **electrical system** was never filed. Cavalier sent out Charlie Shoemaker who was not even an electrician. (Tr. p. 125, L. 2-21). The trial court and the jury were also presented with some photographs that showed how the electrical wires were twisted and exposed instead of being in the inside of the beams protected from outdoor weather conditions. (Tr. p. 152, L. 24 to p. 153, L. 8). These photographs speak for themselves. The electrical system is clearly the responsibility of Cavalier, and there is no testimony in the record that indicates otherwise.

Further, one of the exhibits introduced at the trial of this matter was a "moisture notice control" that indicated what kind of **A/C unit** was to be installed in the inside of the home. This document states that the home needed a four (4) ton unit. (Cp. p. 637). Although Mr. Dudley testified at trial that the AC unit never worked because the units were mismatched, it is undeniable that Cavalier delivered the home with the wrong "moisture notice control". Therefore, following Cavalier's instructions, Albright installed a four (4) ton unit. Bobby Parks, an A/C technician sent by Cavalier to inspect the A/C unit stated in his report that the unit was too small for the size of ***33** the house and needed a five (5) ton unit. (Cp. p. 434; Tr. p. 135, L. 20-23). Therefore, although Cavalier is trying to shift the blame to Albright regarding the A/C problems alleging that Albright installed two incompatible units in the inside and outside of the house, clearly Cavalier should have indicated the proper ton for the inside unit. (Tr. p.258, L. 26-29). It is undisputed that the "moisture notice control" and data plate came directly from Cavalier's factory and they were wrong: Albright was just following Cavalier's instructions. Cavalier presented no evidence at trial to prove that the A/C problem was ever repaired. The jury heard evidence tending to indicate that the problem was never fixed because the Baughmans electrical bill was well over $400.00 when in their prior home it never exceeded $120.00. (Tr. p. 138, L. 13-19).

Mrs. Baughman also testified that shortly after the house was delivered, she noticed **soft spots in the floors** of the kitchen. (Tr. p. 125, L. 22 to p. 126, L. 4). Although Cavalier eventually replaced the floors, it is a clear indication of the poor construction of this home. She also testified that Bobby Parks when he went to the home to fix the AC, he went up in the attic to try to fix the **duct work** which in Mrs. Baughman own words as "something a kid would take and just twist and shove together" (Tr. p. 133, L. 8-12). The jury also heard testimony from Mrs. Baughman concerning the condition of the **plumbing** master bathroom. Mrs. Baughman testified that all the bathtub pipes were hanging and the floor joist was all down. (Tr. p. 129, L. 28 to p. 130, L. 7). No new home should have these problems.

Moreover, Mr. Baughman testified at the trial that when he went up to the roof, he found exposed nails that he tried to cover with tar but was unable to stop the leaks. (Tr. p. 188, L 23 to p. 189, L. 3). Mr. Coker also testified that it is not uncommon to find nails within two inches from the marriage line area of the roof at ***34** the time the two halves are being put together, but that no other nails must be exposed in the roof. He also stated that if nails are found in other areas of the roof, that came straight from the plant. (Tr. p. 225, L. 7-17). The trial court and the jury had an opportunity to see a photograph of the roof that showed exposed nails all over the roof. It is undisputed that if the nails are exposed, as they were in the present case, the interior of the house is exposed to outside conditions, therefore, allowing moisture to enter the house. Cavalier failed to introduce any evidence indicating that Albright was responsible for building the roof. Indeed, Albright was responsible for the marriage line

area of the roof where the two halves meet, but not for building the roof The mobile home was delivered to Albright and to the Baughmans with a roof, and the roof had many exposed nails.

Because many nails were exposed in the roof, the home started to have water leaks that were first observed by Bobby Parks, Cavalier's AC technician. (Tr. p. 133, L. 14 to p. 134, L.3). Eventually, the house had **mold** and the Fire Marshal contacted Cavalier and ordered Cavalier to fix it. (Tr. p. 150, L. 21 to p. 151, L. 10). Cavalier sent Charlie Shoemaker and instead of fixing the leak, the painted over the mold and told Mrs. Baughman that the problem had been fixed. (Tr. p. 149, L. 3-12).

Furthermore, the court and the jury heard the testimony of Mrs. Baughman and Robert Coker regarding the failure of these two halves to match. Mrs. Baughman testified that if the floors were leveled, the ceiling had anywhere from half an inch to an inch opening. (Tr. p. 128, L. 2-23). Neither Albright nor Cavalier were able to match the house. Mr. Coker testified that the house was **"out of camber".** He explained to the jury that out of camber means that the two halves are not tight enough, they are not sealed. (Tr. p. 221, L. 12 to p. 223, L. 12).

***35** It is also undisputed that Charlie Shoemaker, who was primarily the service manager that Cavalier sent to repair Plaintiffs' home, was not qualified to perform anything else but cosmetic repairs. [4] Among other things, Mr. Shoemaker's repairs involved the electrical system, the A/C system, and the roof. Clearly, these are structural repairs that needed an electrician, a roofer and an A/C technician. Cavalier had knowledge of these problems, and instead of sending the proper repair person, they sent a service manager who is only trained and qualified to do cosmetic repairs.

Finally, it is undisputed that although neither Cavalier nor Albright volunteered this information to the Plaintiffs, the house was **damaged during transportation.** Cavalier's representative testified at the trial that the damage occurred during Albright's transportation from their lot in Gulfport, Mississippi, to Plaintiffs property in Bay St. Louis, but failed to introduce any evidence to support this allegation. Mr. Dudley stated that Cavalier was not responsible for the damage because upon delivery to Albright, Albright inspected, signed and accepted both halves. (Tr. p. 251, L. 5-17; Tr. p. 269, L. 24 to p. 270, L. 8; Tr. p. 324, L. 7-12). But we have no idea of whether this is true or not as Cavalier chose not to call Randy Reed to testify about this. However, Mrs. Baughman testified that she was present at Albright's lot the day in which the first half arrived and Randy Reed's inspection consisted of simply cutting a piece of the plastic covering the house and nothing more. (Tr. p. 121, L. 7-18). She also testified that the plastic of the second half was intact when it was delivered to their lot. (Tr. p. 122, L. 19-23). Based on these facts, it is impossible that Randy Reed properly inspected the homes to see if they were damaged during transportation.

The jury heard testimony which seemed to indicate that the transportation damage occurred while the mobile home was transported to Albright. It is undisputed ***36** that both halves left Cavalier's factory on the same day, but were delivered to Albright on different dates. (Tr. p. 326, L. 22 to p. 327, L. 26). Cavalier failed to introduce any reasonable explanation for this fact at trial. Cavalier introduced no evidence whatsoever other than the above mentioned certificates to conclude that the damage occurred in the course of transportation from Albright's lot to Plaintiffs' property. Mrs. Baughman testified that she did not know why both halves were delivered on different dates and that when she purchased her other mobile home both halves arrived on the same day. (Tr. p. 122, L. 24, to p. 123, L. 2). Therefore, this Court should disregard any arguments in Defendant's Motion attempting to indicate that the transportation damage is attributable to Albright, as it is simply an argument based upon nothing more than a document allegedly signed by a person who the Defendant constantly impeached at trial at every opportunity they had, and from a person who they chose not to call to testify at trial. The jury likely concluded that the damage occurred while the house was under Cavalier's control and before it was delivered to Albright, as any other reasonable person would have concluded after hearing the witnesses' testimony. Finally, the Defendant lost its credibility with the jury when the record clearly indicated that it was not until the Plaintiffs' took Cavalier's 30(b)(6) deposition that Cavalier admitted to the transportation damage. Cavalier failed to communicate this fact to Albright, the Plaintiffs, FHA, and the Fire Marshall among other interested parties. (Tr. p. 322, L. 21 to p. 323, L. 15; Tr. p. 324, L. 7-12).

Because Cavalier owed a duty to the Plaintiffs to manufacturer a mobile home free from defects, and Cavalier has breached its duty, and has caused Plaintiffs to suffer damages, Plaintiffs' claim for negligence should be sustained. Plaintiffs have shown

unto this Court that there is substantial evidence opposed to the Motion for ***37** Judgment Notwithstanding the Verdict. The evidence presented by the Plaintiffs at the trial of this matter is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, and therefore, this appeal should be denied, and the jury's verdict allowed to stand. Further, because Plaintiffs have shown unto this Court that the verdict is not contrary to the substantial weight of the evidence, Defendant's Motion for a New Trial should be denied.

II. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION FOR REMITTITUR

A. The Baughmans did own the subject mobile home pursuant to the Uniform Commercial Code.

Cavalier's brief discusses on several occasions the fact that the Baughmans never owned the house and never moved into the house. At trial, when asked about the ownership of the house, Mrs. Baughman testified that technically they did not own it because they never closed on the loan. (Tr. p. 171, L. 5-22). At trial Cavalier moved for directed verdict with respect to the issues of agency and damages. (Tr. p. 275, L. 16-21). When arguing the damages, Cavalier stated that the Baughmans could not claim damages on a good they never owned. (Tr. p. 278, L. 11 to p. 279, L. 7). The Baughmans responded that pursuant to the provisions of the UCC, Section 75-2-401, unless it is otherwise explicitly agreed to, title passes to the buyer at the time and place where the seller completes his performance with respect to the physical delivery of the goods despite any reservation of a security interest. (Tr. p. 281, L. 16-26). The ***38** sale and ownership of a mobile home is regulated by the UCC. This is not something that Defendant and Plaintiffs can pick and choose. It is the law. Therefore, although Mrs. Baughman testified that she did not own the house, they indeed did, and as such, are entitled to recover damages.

B. The Baughmans introduced sufficient evidence at trial for the jury to assess damages against Cavalier in the amount of $140,000.00

Pursuant to Section 11-1-55 of the Mississippi Code Annotated (1972), an additur or *remittitur* can be awarded by the court finding that either: (1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the damages awarded were contrary to the overwhelming weight of credible evidence.

In Dedeaux v. Pellerin Laundry the Court held that when the trial or appellate court is attempting to arrive at the appropriate amount of a remittitur, it should be done by arriving at the amount of the remittitur, which when reduced from the original verdict, would yield the highest verdict which could withstand a motion for remittitur, given the evidence. *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900,907 (Miss., 2007).

Cavalier has consistently tried to make the Plaintiffs admit that their damages are only $40,000.00. Cavalier is now trying to convince this Court that the very maximum that the jury was allowed to award was $40,000.00. However, it is well established under Mississippi Law that the measure of damages for a breach of contract claim is to restore the injured party to the position they would have been had the breach never occurred. In this case but for Cavalier's breach of contract, Plaintiffs ***39** would have purchased an $88,000.00 double wide mobile home, they would not have lived in a FEMA trailer for over two years, and they would not have to build a small simple house years later, Mrs. Baughman testified that if given a choice, she would have preferred a new mobile home rather than the amount of the deposit back. (Tr. p. 159, L. 4-6). Therefore, the Plaintiffs are entitled to at least $88,000.00, plus additional expenses proven to be $4,800.00, mental distress, and attorney's fees and expenses for having to litigate this matter. The only reason why the Baughmans did not close on the loan was because the subject home was so poorly built that it did not pass FHA inspection. Defendant is attempting to use its own wrongdoing to benefit on the issue of damages. Defendant, however, should be estopped from claiming any reduction in damages in any amount less than the purchase price.

In addition, when analyzing the issue of damages in this case, it is also important to remember that Cavalier was paid in full for this mobile home. Would not the Plaintiffs at least be entitled to what Cavalier was paid for this house? If this Court reduces the jury award to the nominal amount of $4,800.00, as claimed by Cavalier, the Defendant will continue to engage in this conduct

in the future knowing that they get paid in full even if the house is never lived in. Clearly, when deliberating its verdict the jury took into consideration that our clients never lived in the house and Cavalier is not out a penny.

Furthermore, Cavaliers remitted amount is unreasonable given the fact that Plaintiffs will likely never collect the $40,000.00 verdict against Mr. Reed of Albright. The jury had an opportunity to hear the testimony of Mrs. Baughman where she broke into tears many times and was still excited to talk about the mobile home in question. Her testimony was never challenged or rebutted. Plaintiffs' counsel mentioned on ***40** several occasions that the Baughmans had incurred expenses, including attorney's fees and other expenses such as expert's fees. (Tr. p. 102, L. 10-15; Tr. p. 232, L. 7-17). In reaching its verdict, the jury surely took many factors into consideration, including, but not limited to, purchase price of the mobile home, mental distress, and attorney's fees and expenses.

Defendant has had ample opportunity to deliver a new mobile home to the Plaintiffs while they were living in the FEMA trailer for more than two years after they originally purchased the home. Cavalier has never, in the past six (6) years, tried to resolve this matter. The award of damages against Cavalier in the amount of $140,000.00, is neither biased, prejudiced, or passionate nor contrary to the overwhelming weight of credible evidence. Indeed, it is a fair and reasonable amount that represents the collective conscious of the community. Further, the jury did not award any more damages than what the parties asked for. Plaintiffs asked for $140,000.00 verdict against Cavalier, and Defendant asked for $40,000.00, against Albright. The jury satisfied both parties' request, and as such, the jury award should not be remitted.

I. CONCLUSION

The evidence presented and heard at the trial of this matter and the arguments of the Plaintiffs in Response to Defendant, Cavalier's, Motions, show that Albright was an apparent agent of Albright. Plaintiffs further proved that Cavalier, through agency and warranty, was contractually obligated to the Plaintiffs, and that Cavalier breached its duty by failing to repair and later replace Plaintiffs' home. Plaintiffs have also shown unto this Court that not only is Cavalier liable in contract but also in ***41** negligence by failing to manufacturer a house suitable for its intended purpose and by failing to make proper repairs and/or sending inexperienced and disqualified service managers to attempt to repair the house. Because a reasonable jury would have found Cavalier liable and there is sufficient evidence for the jury's findings, Defendant's Motion for Judgment Notwithstanding the Verdict, and Defendant's Motion for a New Trial, the trial court did not err in denying these Motions.

Plaintiffs have also shown unto this Court that Plaintiffs are entitled to damages for the purchase price of the house, plus additional expenses proven to be $4,800.00, pain and suffering, and attorney's fees and expenses for having to litigate this matter. The jury verdict in the amount of $140,000.00 against Cavalier was neither biased, prejudiced, or passionate nor contrary to the overwhelming weight of credible evidence, and as such the jury award should not be remitted. The trial court did not err in denying Cavalier's Motion for remittitur.

Footnotes

1 An agency relationship exists **and a principal is bound by the acts of the agent as against a third party where the agent** had (1) *express authority* directly granted by the principal to bind the principal as to certain matters, or (2) *implied authority* to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority, or (3) *apparent authority.* Patriot Leasing v. Jerry Enis Motors, 928 So.2d 856 (Miss., 2006.(emphasis implied).

2 *Levine v. Standard Oil Co., Inc., in Ky.*, 249 Miss. 651,163 So. 2d 750 (Miss. 1964).

3 Defendants breached the contract by delivering to the Plaintiffs a mobile home which was not of good quality, was not constructed in an acceptable workmanlike manner, was not properly leveled and did not meet the suitable and reasonable expectations of the Plaintiffs. Further, after notice was given, the Defendants breached the contract by failing to timely repair or repair at all the warranted defects.

4 Charlie Shoemaker testified at this deposition that he was a cosmetic repair person for Cavalier.

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